Supreme Court, U.S.
FILED

No. 06-751 NOV 27 2006

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IN THE
Supreme Court of the United States

* * * * *

DONALD ROBERTS,
Petitioner,

vs.

MIKE KEMNA and JEREMIAH NIXON, ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Respondents.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

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QUESTIONS PRESENTED

Whether a certificate of appealability should be issued to allow the Court of Appeals to determine whether Mr. Roberts's constitutional right to be free from adverse comment on his failure to testify was violated when defense witnesses were presented and the prosecutor said, in final argument, "You haven't heard any testimony about what [the defendant] said, about his theory of the case."?

Whether a certificate of appealability should be issued to allow the Court of Appeals to determine whether Mr. Roberts showed "cause and prejudice" sufficient to excuse post-conviction counsel's failure to present a claim which Mr. Roberts made known to post-conviction counsel but which post-conviction counsel inadvertently omitted from state pleadings in violation of state rules?

TABLE OF CONTENTS

Questions presented..... i

Table of Contents ii

Table of Authorities iv

Opinion below..... 1

Jurisdiction 1

Statutory and Constitutional Provisions Involved..... 2

Statement of the Case..... 9

Reasons for Granting the Writ 13

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE THE COURT OF APPEALS TO CLARIFY THE LAW CONCERNING ADVERSE COMMENT ON FAILURE TO TESTIFY..... 13

II. THIS COURT SHOULD GRANT CERTIORARI AND REQUIRE THE COURT OF APPEALS TO DEVELOP THE ISSUE OF ABANDONMENT BY STATE POST-CONVICTION COUNSEL. ... 17

Conclusion..... 20

Appendix

Order Dismissing Appeal 1a

U.S. District Court Memorandum Opinion..... 2a

Report and Recommendation of Magistrate..... 6a

Report of Dr. Richard L. Payne, M.D. 37a

Order Denying Rehearing en Banc..... 40a

TABLE OF AUTHORITIES

Cases

Griffin v. California, 380 U.S. 609 (1965)..... 13, 14, 16

Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759 (Nev. 1991) 14, 16

Mapes v. Coyle, 171 F.3d 408, 429 (6th Cir. 1999)..... 19

Miller-El v. Cockrell, 537 U.S. 322, 338 (2003)..... 16

State v. Dees, 916 S.W.2d 287, 295 (Mo. App. 1995), cert. denied 519 U.S. 857 (1996) 15

State v. McMurry, 143 Idaho 312, 143 P.2d 400, 403-404 (Id. App. 2006)..... 15, 16

State v. Miller, 76 N.M. 62, 70, 412 P.2d 240, 246 (N.M. 1966) 15

United States v. Lyon, 397 F.2d 505, 509 (7th Cir.), *cert. denied sub nom., Lysczyk v. United States*, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968) 14

United States v. Williams, 445 F.3d 724, 737 (4th Cir.), cert. denied, 127 S.Ct. 314 (2006) 16, 4, 21

Statutes

18 U.S.C. §2253 3

28 U.S.C. §1254 1

28 U.S.C. §2254 ..... 9, 12, 4, 22, 36

Other Authorities

Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO STATE JOURNAL OF CRIMINAL LAW 183, 189 (2006) 19

Rules

Mo. Sup. Ct. R. 29.07(b)(4) 17

Mo. Sup. Ct. R. 29.15..... 4, 5, 8, 9, 11, 17, 18, 3, 18, 33, 34

Constitutional Provisions

U.S. CONST. Amend. V 2, 15

U.S. CONST. Amend. VI..... 2

U.S. CONST. Amend. XIV 3

U.S. CONST. Art. I, §9 2

I

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Donald Roberts, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals, Eighth Circuit rendered in these proceedings on July 18, 2006.

OPINION BELOW

The unpublished order of the United States Court of Appeals denying a certificate of appealability is reprinted in the Appendix at page 1a, *infra*. The unpublished order of the United States Court of Appeals, Eighth Circuit, denying rehearing is reprinted in the Appendix at App. p. 40a, *infra*. The unpublished order of the United States District Court, and the report and recommendation of the United States Magistrate Judge, Eastern District of Missouri, are reprinted in the Appendix beginning at pages 2a and 6a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, was entered July 18, 2006. A timely petition to that court for rehearing or, in the alternative, for rehearing *en banc*, was denied August 29, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Art. I, §9, cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. Amend. V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time or war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. Amend. XIV, Due Process Clause

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

18 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal for a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicated which specific issue or issues satisfy the showing required by paragraph (2).

Mo. Sup. Ct. R. 29.15. Conviction After Trial--Correction

(a) **Nature of Remedy--Rules of Civil Procedure Apply.** A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) **Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of.** A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be

filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

(1) An appeal of such judgment or sentence is taken;

(2) The appellate court remands the case resulting in entry of a new judgment or sentence; and

(3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

(1) The date the person is delivered to the custody of the department of corrections; or

(2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) **Clerk's Duties.** Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) **Contents of Motion.** The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) **Pro Se Motion--Appointment of Counsel--Amended Motion, Required When.** When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant

prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) **Withdrawal of Counsel.** For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) **Amended Motion--Form, Time for Filing--Response by Prosecutor.** Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) **Hearing Not Required, When.** If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) **Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof.** At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) **Findings and Conclusions--Judgment.** The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) **Appeal--Standard of Appellate Review.** An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an

indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) **Successive Motions.** The circuit court shall not entertain successive motions.

(m) **Schedule.** This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.

STATEMENT OF THE CASE

Summary. This petition concerns the failure of the district court and court of appeals to issue a certificate of appealability in Mr. Roberts's federal habeas corpus proceeding under 28 U.S.C. §2254.

Facts and procedural history. Mr. Roberts was convicted of second degree murder, first degree assault, and

two counts of armed criminal action. He was sentenced to four consecutive life terms. He presented a defense of self-defense.

Mr. Roberts was a passenger in a car driven by Thomas Gould. Christopher McLafferty (the decedent) and Louis Viviano were in another car. Both cars stopped on the highway. Mr. Viviano and Mr. McLafferty got out of their car and walked toward Mr. Gould's car. Mr. Gould testified that he was scared for his life because Mr. McLafferty was crouching down, moving towards him while Mr. Gould was still in the car.

Mr. Roberts got out of the car and walked toward Mr. McLafferty. Mr. McLafferty left the driver's side of Mr. Gould's car, went to the car's passenger side where Mr. Roberts was standing, and punched Mr. Roberts so hard that Mr. Roberts fell to the ground, stunned.

After Mr. McLafferty walked toward Mr. Roberts, Mr. Viviano came up to Mr. Gould. When Mr. Roberts regained some consciousness, he saw Mr. Viviano holding Mr. Gould's head and punching him. When Mr. Roberts swung to his left to get back in the car, Mr. Viviano tried to grab him.

Mr. Viviano testified that he saw Mr. Roberts get out of the car and run behind Mr. McLafferty. Mr. Viviano told Mr. McLafferty, "Come on, let's go," then Mr. McLafferty said he had been stabbed. He saw Mr. McLafferty standing dazed and drenched in blood. He carried Mr. McLafferty towards the car and then noticed that he had also been cut. He never saw Mr. Roberts actually come at him and never saw a knife in Mr. Roberts' hand. Mr. Viviano had stab wounds to his arm, hand, the left side of his chest, and abdomen, requiring surgery. Mr. McLafferty died of multiple stab wounds.

Mr. Roberts presented testimony from the driver of his car, Thomas Gould, and two other witnesses who saw part of the altercation but were not involved. Mr. Gould testified concerning the attack on him by Mr. Viviano and Mr. McLafferty's attack on Mr. Roberts.

In final argument, after stating that the prosecution witnesses gave consistent testimony, the prosecutor stated, "You haven't heard any testimony about what [the defendant] said, about his theory of the case." A defense objection was sustained, and an instruction was given the jury to disregard the comment. r. Roberts's motion for mistrial was denied.

Appeal. On direct appeal, the Missouri Court of Appeals found that Mr. Roberts's right against self-incrimination was not violated because the prosecutor's challenged comment was not an improper comment on failure to testify.

Post-conviction proceedings. Mr. Roberts filed a *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15. Under that rule, when a *pro se* motion for post-conviction relief is filed, counsel is appointed. Counsel is commanded to "ascertain. . . whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not. . . include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional claims." Mo. Sup. Ct. R. 29.15(e). There is no requirement that the movant review or sign the amended motion before filing. Rule 29.15 provides that it is "the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated," which include claims of ineffective assistance of counsel.

Mr. Roberts's appointed post-conviction lawyer sent him a questionnaire to determine whether he had additional claims not listed in the original motion. In his response, Mr. Roberts indicated that Dr. Richard Payne should have been called as a witness to testify that the wounds received by the victim had probably occurred in the way Mr. Roberts's witnesses described, rather than as the state's witnesses said.

When preparing the amended motion, post-conviction counsel overlooked this point. She did not provide Mr. Roberts with a draft of the amended motion before it was filed, and filed it near the date it was due. Mr. Roberts contacted counsel as soon as he noticed that the amended motion did not contain this claim, but by then the deadline for filing an amended motion had passed. Post-conviction counsel obtained a report from Dr. Payne, App. p. A-38[1], but made no attempt to present Dr. Payne's evidence in court. After evidentiary hearing, the motion court denied relief, and the Missouri Court of Appeals affirmed.

Mr. Roberts then filed a timely proceeding under 28 U.S.C. §2254. After receiving a report and recommendations from a United States Magistrate Judge, App. p. A-7, the district court denied relief, and also denied a certificate of appealability. App., p. A-2. The court of appeals likewise denied certificate of appealability and dismissed the appeal. App. p. A-1.

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[1] Dr. Payne's report was presented to the district court as Traverse Exhibit 4.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE THE COURT OF APPEALS TO CLARIFY THE LAW CONCERNING ADVERSE COMMENT ON FAILURE TO TESTIFY.

Since *Griffin v. California*, 380 U.S. 609 (1965), this Court has consistently held that it is a violation of the Fifth Amendment for the prosecutor to comment on the defendant's failure to testify at trial. Here, by misconstruing the prosecutor's words, the courts of Missouri and the Eighth Circuit Court of Appeals have eviscerated this right.

In final argument, the prosecutor was discussing defense counsel's theory of the case. He said, "You haven't heard any testimony about what he said, about his theory of the case." Defense counsel objected and received an instruction to disregard, but the court denied his motion for mistrial.

Rejecting Mr. Roberts's contention that the prosecutor's statement constituted an impermissible comment on his failure to testify at trial, the courts below have focused exclusively on the antecedent of the pronouns "he" and "his" in the above statement. They have held that it is clear that these pronouns refer to defense counsel, rather than the defendant. That may be true. But what is significant here is the prosecutor's use of the word "testimony" in connection with the defense theory, not the antecedents of "he" and "his."

The defense argued that Mr. Roberts feared for his life when he struck out at Mr. McLafferty. Mr. Roberts offered testimony on behalf of the defense. But he did not testify. There was only one person who could have offered

"testimony" about defense counsel's theory of the case which was not presented. That person was Mr. Roberts.

In *Griffin v. California*, 380 U.S. 609, 611 (1965), this Court held,

> It is said. . . that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. [citation omitted.] What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

For that reason, the Court condemned the California court's holding that a prosecutor could properly comment on the failure of the defendant to testify as to "any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge. . ." *Id.* at 610.

When, as in this case, the prosecutor does not specifically refer to the defendant's failure to testify, the comments are nevertheless improper if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir.), cert. denied sub nom., *Lysczyk v. United States*, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968).

In *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759 (Nev. 1991), the Nevada Supreme Court applied this test

to the prosecutor's statement, "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case? . . . Again, we know so little about the case really in terms of what the defendant told us, which naturally raises the logical question, what is he hiding?" The Court found that the statement was a violation of the Fifth Amendment despite holding that the prosecutor did not necessarily *intend* to comment on the defendant's failure to testify. Instead, the Court focused on the fact that the jury would necessarily assume that their attention was being directed to the failure to testify.

Unlike the exclusionary rule against evidence of illegal searches, which is enforced by this Court because of its prophylactic effect on law enforcement, the rule against comment on failure to testify simply enforces the Fifth Amendment. It is not intended to punish the state for the prosecutor's improper conduct. Therefore, the prosecutor's intent, while not irrelevant, should not be the primary focus of the analysis. Rather, the focus should be on the jury's probable understanding of what the prosecutor said. See *State v. Miller*, 76 N.M. 62, 70, 412 P.2d 240, 246 (N.M. 1966) (Any comment on failure to testify violates the Fifth Amendment); *State v. McMurry*, 143 Idaho 312, 143 P.2d 400, 403-404 (Id. App. 2006) (Prosecutor's comment "reinforced the suggestion that McMurry's silence at trial was evidence of guilt."

Illustrative of the lengths to which state and federal courts go to avoid reversal on this issue is the Missouri case of *State v. Dees*, 916 S.W.2d 287, 295 (Mo. App. 1995), *cert. denied* 519 U.S. 857 (1996). There, the court declined to grant plain error relief when the prosecutor said, in final argument, that Ms. Dees "hasn't come forward and given truthful testimony." And the Ninth Circuit Court of Appeals ratified the California courts' determination that the

prosecutor's comment in *Hovey v. Ayers*, 458 F.3d 892, 911-912 (9th Cir. 2006), "Well, [Hovey] has admitted in effect the kidnapping and he has admitted in effect the killing, but he's never said anything to you about why, why he did these things," was harmless error. Finally, the Fourth Circuit recently held that the prosecutor's statement, "Is silence what an innocent man does? Does an innocent man not protest when somebody asks?" did not constitute an impermissible comment on failure to testify. *United States v. Williams*, 445 F.3d 724, 737 (4th Cir.), *cert. denied,* 127 S.Ct. 314 (2006). Clearly, this issue deserves further attention from this Court.

Moreover, the denial of certificate of appealability in this case was a clear violation of *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Given the decisions in *Griffin*, *Harkness*, *Miller*, and *McMurry*, supra, the decision of the district court in this case is at least "debatable among jurists of reason." As this Court noted in *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003):

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Neither the district court nor the court of appeals explained why they concluded that Mr. Roberts was not entitled to a certificate of appealability on this issue. It can only be concluded that, like the Court of Appeals in *Miller-El v. Cockrell*, supra, the courts here impermissibly focused on the merits of the issue rather than the fact that a significant issue of constitutional law was presented. In light of this continuing confusion about the standard for a

certificate of appealability, review by this Court is appropriate.

II. THIS COURT SHOULD GRANT CERTIORARI AND REQUIRE THE COURT OF APPEALS TO DEVELOP THE ISSUE OF ABANDONMENT BY STATE POST-CONVICTION COUNSEL.

This Court has been understandably reluctant to intrude when state courts provide post-conviction procedures. But when such procedures curtail the criminal defendant's attempts to present claims of ineffective assistance of counsel rather than providing an avenue for the defendant to litigate such claims in state court, the intervention of the federal courts is warranted and necessary. Mr. Roberts's situation presents such a case.

Mr. Roberts, as required by Mo. Sup. Ct. R. 29.07(b)(4), was advised of his right to proceed under Mo. Sup. Ct. R. 29.15. Despite the fact that he is of low intelligence and low educational level, he complied with the requirements of Rule 29.15 and timely filed a motion for post-conviction relief and an affidavit of indigence. The court then properly appointed a Missouri public defender to represent him.

Under Missouri law, the duties required of a public defender are minimal:

> Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant,

> counsel **shall** file an amended motion that sufficiently alleges the additional facts and claims.

Mo. Sup. Ct. R. 29.15(e), emphasis added. Mr. Roberts's appointed counsel made a minimal attempt to comply with this provision. She never met with Mr. Roberts, but she did send him a written questionnaire which asked him various questions about possible issues in his case. Mr. Roberts did his part. He completed the questionnaire as best he could, and mentioned that he had an expert witness, Dr. Richard Payne, who had not been presented at trial. This claim was not included in Mr. Roberts's pro se post-conviction motion.

Dr. Payne would have testified about a highly disputed issue at trial: Whether Mr. Roberts stabbed Mr. McLafferty when the latter was attacking him, as Mr. Roberts's witnesses testified, or whether Mr. Roberts ran after Mr. McLafferty and stabbed him from behind as he was retreating, as the state's witnesses testified. Dr. Payne would have stated that Mr. McLafferty's wounds were more consistent with being stabbed from the front. This unbiased evidence would have greatly strengthened Mr. Roberts's claim of self-defense. Dr. Payne's report, App. p. A-38, establishes that he was available at the time of Mr. Roberts's trial and would have presented testimony had he been retained to do so. Since trial counsel argued (without much support in the record) that Mr. Roberts had stabbed Mr. McLafferty from the front, there is no strategic reason why trial counsel should not have presented Dr. Payne's expert testimony. Thus, this post-conviction claim includes all the elements of a meritorious claim of ineffective assistance of counsel.

Once post-conviction counsel had received Mr. Roberts's questionnaire identifying his claim that Dr. Payne

should have been presented at trial, her responsibility under Missouri law was to "file an amended motion that sufficiently alleges the additional facts and claims." But she omitted this claim which Mr. Roberts had identified. And she did not give him an opportunity to remind her of this omission before the due date of the amended motion. Missouri provides no procedure for correcting this error, and therefore post-conviction counsel was unable to present evidence to support Mr. Roberts's claim. No court has yet heard such evidence.

> [I]t is entirely sensible that a state post-conviction remedy that is no more than a delusive hope, for example one that cannot be effectually employed without the assistance of a competent attorney, should not generate a procedural default that the federal courts are bound to respect. . .

Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases,* 4 OHIO STATE JOURNAL OF CRIMINAL LAW 183, 189 (2006). Mr. Roberts is in exactly the circumstance contemplated by Mr. Freedman. He did what he was supposed to do under Missouri law. He filed a *pro se* motion and gave his appointed post-conviction counsel the information she requested. As in *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir. 1999), Mr. Roberts did what he was required to do under Missouri law, and should not be responsible for the Missouri courts' failure to consider his claim. The federal court's reliance on post-conviction counsel's failure to do what Missouri law required her to do to bar review of Mr. Roberts's claim of ineffective assistance of counsel is "debatable among jurists of reason." Mr.

Roberts is entitled to a certificate of appealability as to this issue, and this Court should grant certiorari and so hold.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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